

1 IN THE UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF ILLINOIS
3 EASTERN DIVISION

4 In Re: TRANS UNION)
5 CORPORATION, Privacy)
6 Litigation, et al.,)
7) No. 00 C 4729
8) MDL 1350
9) Chicago, Illinois
10) March 4, 2008
11) 10:00 a.m.
12)
13)

14 TRANSCRIPT OF PROCEEDINGS - STATUS
15
16 BEFORE THE HONORABLE JUDGE ROBERT W. GETTLEMAN

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1 (Proceedings in open court.)

2 THE CLERK: 00 C 4729, in Re: Trans Union Corporation,
3 privacy litigation.

4 MR. BORDERUD: Good morning, Your Honor.

5 John Borderud appearing on behalf of plaintiffs.

6 MR. LONGTIN: Good morning, Your Honor.

7 Roger Longtin on behalf of Trans Union with Peter
8 Donoghue.

9 MS. WHEELAHAN: Good morning, Your Honor.

10 Dawn Wheelahan for the Louisiana plaintiffs.

11 MR. SCRIVEN-YOUNG: Good morning, Your Honor.

12 David Scriven-Young from McDermott Will & Emery on
13 behalf of defendant Acxiom.

14 MS. SAUNDERS: Good morning, Your Honor.

15 Terry Rose Saunders on behalf of the MDL plaintiffs.

16 MR. DOYLE: Good morning, Your Honor.

17 Thomas Doyle, also MDL plaintiffs.

18 MR. FEIN: Cory Fein on behalf of the Texas plaintiffs.

19 MR. TOUPS: Mitchell Toups on behalf of the Texas
20 plaintiffs, Your Honor.

21 MR. EDELMAN: And Daniel A. Edelman on behalf of certain
22 plaintiffs.

23 THE COURT: And which are those, Mr. Edelman?

24 MR. EDELMAN: I'm local counsel for Texas and Louisiana.

25 MS. WHEELAHAN: And for me when I need a favor, Your

1 Honor.

2 THE COURT: All right. I have four matters on the
3 agenda today that I'd like to discuss, the most important being
4 perhaps the objections to Judge Mason's R&R on the settlement. I
5 also have Louisiana and Texas plaintiffs' motions to be
6 appointed counsel with the target marketing class. I have a
7 Trans Union motion to enforce protective order. I don't know if
8 that's still viable or not. And then I have the Louisiana
9 plaintiffs' motion to lift the protective order.

10 Anything I missed?

11 MR. LONGTIN: On the last two, Your Honor, our motion to
12 enforce the protective order is before Judge Mason.

13 THE COURT: Is it? Okay. That's probably where it
14 belongs, if anywhere.

15 And the motion to lift the protective order, that was
16 filed with me.

17 MS. WHEELAHAN: That's filed with you, Your Honor. And
18 if you want to hear about it, as in most things, there is a
19 compromised position, but sometimes we need help to get there.

20 THE COURT: Well, I think that's sort of the tail
21 wagging the dog here.

22 On the objections to Judge Mason's R&R, I don't think --
23 I think I've had so many briefs on that. Of course, I've had
24 Judge Mason's opinion to review as well. And I don't think,
25 unless you think I need more argument on that, I really don't

1 think I do. Anybody want to --

2 MR. BORDERUD: Depends on what your results, Your
3 Honor.

4 THE COURT: It doesn't go that way, sorry. That's like
5 asking for a jury verdict and then saying, "Well, it depends on
6 how you guys come out, and then I'll do another closing
7 argument."

8 MR. LONGTIN: Your Honor, obviously if you have any
9 questions, we'd be willing to come back and answer them, but I
10 don't think I really have any, certainly not any more to say on
11 behalf of Trans Union.

12 THE COURT: I don't.

13 I guess I should start by saying that I know how hard
14 you worked on this, and I know how hard a problem this is,
15 because all of these things taken together demonstrate how
16 difficult this situation is. Frankly, looking at a lot of these
17 other cases as I've been for a long time now and again recently
18 in preparing for today's proceedings, there is no doubt in my
19 mind this case is pretty unique. I don't think any of these
20 other cases really, they help, but they don't definitively point
21 the way.

22 To make a long story short to keep you out of suspense,
23 I am overruling the objections to Judge Mason's report and
24 recommendation, and I'm adopting it.

25 I know there are some problems with it that you pointed

1 out. There is no precedential value. There is no law of the
2 case, except to the effect that he's rejected the settlement
3 proposal.

4 Apparently there were some missstatements or at least
5 purported missstatements of some facts and that sort of thing in
6 there, but I don't think that that's binding on me or the
7 parties. What is binding I think is that we don't have a
8 settlement here at the moment.

9 I can go over my reasoning very briefly, but I really
10 don't think I have to. I agree with Judge Mason on a number of
11 things. The notice is inadequate. We're missing too many
12 people. The type of notice that you've suggested, it may be on a
13 practical level sensible to some degree. But it just doesn't
14 reach enough people. We have to find a better way to notify
15 everybody that they have certain rights.

16 The relief itself, I know there is a lot of disagreement
17 about how you measure the relief and how you measure the cost,
18 but I agree with Judge Mason that it's inadequate, because the
19 potential here is just so huge -- and you can argue about whether
20 or not we could have, whether or not the willfulness will be
21 easily proved or not. After the Safco case, it's a lot easier.
22 And I think that the chances of proving willfulness here are
23 great enough that you're undervaluing the value of this recovery.

24 On those two grounds alone it seems to me sufficient to
25 reject the proposed settlement. Judge Mason goes into a lot more

1 detail and thoughtful ness. He certainly struggled with all of
2 you for many years, several years on thi s.

3 That doesn' t mean, however, that the notion or the
4 structure of the settlement isn' t sensible or that a settlement
5 coul dn' t be reached. You know, I wish I had the time and
6 resources to write a tome on thi s myself like Judge Mason did,
7 and maybe I wi ll one day, but today isn' t that day.

8 I think that Ms. Wheelahan, I asked her to give me some
9 of her own i deas, I know she' s been sort of involved with all of
10 thi s, and she did gi ve me some i deas. I don' t remember seeing
11 responses to those. But maybe they' re in thi s pile somewhere.
12 I' ve got so many papers on all thi s that I missed it.

13 But there are other ways to do it. And I think that
14 what thi s convinced me anew was that a nationwi de settlement here
15 really is, if it' s going to be settled, it' s got to be
16 nationwi de. It can' t be, you know, we can' t be tal ki ng about \$19
17 bi llion. There is not \$19 bi llion to go around. But we have to
18 be tal ki ng about a lot more than the \$10 mi llion really that' s on
19 the table, because that' s really in my view all that' s on the
20 tabl e.

21 This i n-ki nd rel ief is ephemeral . You can hardl y turn
22 on the TV today, and I' m not a great TV watcher, but when I do
23 watch what little TV I do watch, you can' t hel p but be bombarded
24 by ads for free credit reporting and all the rest of it. I don' t
25 know what that means. I know i t doesn' t i nclude the insurance

1 aspect that Trans Union put on the table. But giving people free
2 credit reports is giving them nothing that they can't get
3 already. That's just one facet of this.

4 We have to find a way where people can be informed of
5 their rights and be able to apply for a certain amount of
6 monetary relief here. Otherwise the alternative is to hold a
7 trial on willfulness and either reconsider a nationwide class
8 altogether on the target marketing or wait until we get 50 new or
9 maybe 36 new cases filed state by state for target marketing
10 classes, because I do believe that the statute has been tolled
11 all these years for target marketing class members nationwide.

12 There has been a nationwide, you know, it's an
13 interlocutory order that I entered, and it can be changed. So I
14 think it's likely that it's tolled and that we'll be right back
15 to either a nationwide class or at least reconsideration of that
16 or 50 different state target marketing classes, and we'll have to
17 deal with this one way or the other.

18 The case should be settled. And it should be settled in
19 a way that means a lot more money on the table from Trans Union.
20 That's how I feel about this.

21 I don't want another extended period of negotiating,
22 however, because it's just been too long. This is a 2000 case
23 that's been going on since the mid '90s with the FTC, and it's
24 time to bring this to a head.

25 A lot of the class members, even if we were to send them

1 direct mail notice, which we're not going -- which I'm not
2 proposing, that would be, that itself, I did the numbers
3 somewhere here, and they're staggering. I have some suggestions,
4 and maybe you all have them in your own heads as well, but I
5 think there are ways to give better notice than you've proposed
6 here.

7 There has to be a way for everybody to understand what
8 their rights are and be able to apply for some sort of relief.
9 It won't be, you know -- I think there are some really serious
10 issues here. I don't know what the Court of Appeals would do
11 with this. But I know what I would be willing to approve, and I
12 know what I think Judge Mason would be willing to approve or at
13 least a ballpark, and it would be less than the statutory
14 damages, whether that's even allowable. I don't even know to be
15 honest with you.

16 I don't want to put Trans Union out of business. But
17 anything close to even a minimal statutory award here, assuming
18 the most generous measure of damages would have that result it
19 would seem to me.

20 If we have 190 million people with only one violation
21 per person, it would be \$19 billion. And there ain't 19 -- there
22 isn't \$19 billion. So you have to figure something out. But
23 that doesn't mean people get nothing.

24 And I know what the numbers are here since I've seen the
25 reports that were filed under seal, and I believe that Trans

1 Union can afford to pay a lot more than they have put on the
2 table. If they're unwilling to do that, then we have -- then let
3 the chips fall where they may. That's all I can say. I mean, I
4 can't force a settlement. I can just tell you what I think the
5 structure has to be.

6 So the result is that I'm sustaining Judge Mason's
7 rejection of the settlement.

8 Then we have the motion to lift the protective order.
9 And I think Ms. Wheelahan has a very strong point on this. I
10 didn't see a response to that. And if there was one filed I
11 just --

12 MR. LONGTIN: No.

13 THE COURT: There wasn't? Good. I tried to get
14 everything in order. And now, of course, having gone through it
15 again this morning, everything is out of order, so I couldn't
16 find it if it was here.

17 But the notion of trying to, if there is going to be a
18 class settlement where there is going to be a fairness hearing no
19 matter what we do, and we're going to allow people to opt in or
20 opt out or take their chances filling their own individual
21 actions, which has to be a component of this, which I think all
22 of you recognize, the only way it seems to me to allow any
23 intelligent decision is to allow them to know what their options
24 are and what their chances are.

25 Now, it may be that we don't need exact numbers. Maybe

1 we need, you know, at least type numbers or, you know, you could
2 phrase it in some way. I don't think anybody is trying to pry
3 into all of the private finances of Trans Union. It is a private
4 company. And that cuts several ways. One is there are private
5 interest at stake in keeping financial information closer than it
6 would be if it were a public company. On the other hand, the
7 public interest isn't, you know, putting a private company in
8 jeopardy, it doesn't have the implications of putting a public
9 company in jeopardy, if that's what ultimately happens here.

10 So as I say, that cuts both ways. But I think there
11 should be -- maybe you hinted at this earlier, Ms. Wheelahan,
12 that there are compromises that can be made if there is going to
13 be a proposed settlement. If there is not going to be a proposed
14 settlement, then I don't think at this point you have to make
15 that information public.

16 As far as the 23(g) motion is concerned, I must tell you
17 that I am up in the air on that. On one hand, you know, you're
18 all very good lawyers, and I appreciate getting materials from
19 very good lawyers, but it makes the decision making sometimes
20 that much harder.

21 But before I get to that, I guess I'm going to put the
22 question to both the plaintiffs' counsel and defense counsel
23 right now, and that is, having upheld Judge Mason's rejection of
24 this settlement proposal, what is next on your agenda? I'm
25 assuming that you've thought about this possibility, if not

1 likelihood.

2 I think I should say, too, I'm not writing on this. So
3 I think I want to make this oral record as clear as I can. I do
4 believe that the standard of review is de novo. It's a question
5 of law. It's not a question of fact. I don't think it's -- it's
6 really a recommendation to me having worked out a settlement with
7 you, something that I would have to approve both preliminarily
8 and finally, so, therefore, it's my decision ultimately, and I
9 did review his decision de novo.

10 All right. Now, with that clarification, what do the
11 plaintiffs plan now?

12 MR. BORDERUD: If I may, Your Honor? I suppose in view
13 of the rejection we would ask the Court to put the case back on
14 the litigation track, and we would propose probably a timeline
15 for filing a nationwide motion for class certification, possibly
16 with also state-by-state classes of the plaintiffs we represent.
17 That would be another possibility. We would probably ask for a
18 discovery cut-off --

19 THE COURT: You're talking about target marketing then?

20 MR. BORDERUD: Correct, correct. We'd also ask for a
21 discovery cut-off, probably September 1st to complete discovery
22 on the willfulness issues and some other things.

23 THE COURT: What more discovery do you need on that?

24 MR. BORDERUD: Simultaneously we would probably explore
25 whether or not your comments today suggest anything to the

1 defendants with respect to any changes they might feel they might
2 be able to make.

3 THE COURT: Well, I think there has been a lot written
4 by the higher courts since I made that initial decision, which I
5 would have to consider. I haven't made a decision yet, but I
6 told you that I would be agreeable to rethinking that on the
7 class.

8 And it occurred to me that whether or not there would be
9 a trial or a summary judgment on the willfulness issue would be
10 up to the parties really. If it were a trial, I assume it would
11 be a jury trial on that issue alone. And that would be for all
12 cases, because it's the same issue for all cases.

13 MS. WHEELAHAN: There might be a collateral estoppel
14 issue, Your Honor, that we would tee up.

15 THE COURT: Collateral estoppel issue.

16 MS. WHEELAHAN: Having to do with the decisions that
17 came from the FTC action.

18 MR. BORDERUD: It's summary judgment.

19 THE COURT: Well, that might be part of a summary
20 judgment motion. I assume that you're going to want to try a
21 summary judgment motion anyway. I'd like to, I'd like to get
22 this on as fast a track as possible.

23 What do the defendants --

24 MR. LONGTIN: Well, obviously, Your Honor, our conduct
25 is somewhat contained by what the plaintiffs do. We would be

1 prepared to defend against those issues. We've thought about
2 summary judgment on the willfulness issue. I'm not so sure that
3 the Court's comments about the trial binding everybody might
4 work. Obviously we have to think about those things.

5 THE COURT: Well, there is a distinction between states
6 classes of consumers. I mean, we obviously have the firm offer.
7 **But I think as we all know, the target marketing is where the big**
8 **numbers lie here.**

9 MR. LONGTIN: That's everybody. You know, we'll take
10 your comments back to our clients about settlement.

11 But, you know, frankly, Your Honor, one of our problems
12 in the settlement process as a whole is, **we've sat down and gone**
13 **through this process with Judge Mason twice, and at no time**
14 **during those conversations was he critical of the amounts being**
15 **offered to resolve the case.**

16 You know, somebody would have said "no" in the middle of
17 the negotiations. I mean, I know you're shaking your head, and I
18 appreciate that. You know, I apologize --

19 THE COURT: All I know is what --

20 MS. WHEELAHAN: I said "no," Judge. Nobody heard me.

21 THE COURT: Well, wait a minute. Wait a minute. I just
22 want to stop you right now, because I want this record to be
23 clear. Judge Mason and I have had a lot of talks about this
24 case. We've met with you together on a number of occasions, and
25 we've coordinated. I've never ever talked to him about the

1 details of your settlement. So all I know is what I saw in his
2 R&R.

3 Now, if I was shaking my head, it's because I would just
4 have assumed that these numbers were put to him, and maybe he was
5 being very Solomonic and sitting back and listening politely to
6 what you had to say. But I don't want to inject myself in the
7 mediation process that you engaged in with him. All I know is
8 that it took an awful long time, and I know you all -- I'm not
9 doubting that you all worked hard.

10 He rejected the notion that the plaintiffs' lawyers
11 weren't doing their best. And we'll get to that in a minute.

12 But anyway, go ahead. I'm sorry.

13 MS. WHEELAHAN: If I could say for the record, Your
14 Honor --

15 THE COURT: No. Wait. He has the floor.

16 MS. WHEELAHAN: All right.

17 MR. LONGTIN: Thank you, Your Honor.

18 You know, the Court has indicated that you have some
19 ideas and what is fair in this case.

20 THE COURT: Well, Ms. Wheelahan, you know, I invited her
21 to put some suggestions up.

22 MR. LONGTIN: I understand. And the numbers in that
23 settlement were a judgment of \$900 million reduced and a
24 settlement value of 300 million for a complete release of all
25 claims. That's the way I read it.

1 She also has a scheme that was laid out without numbers
2 associated with it that had a two-part level of resolving claims,
3 but it had no numbers associated with it. So there is one that
4 says 900 million reduced to 300 million and one that has a
5 scheme.

6 The Court has indicated it has some ideas. You know, I
7 will pass on to my client all of these ideas. But you're right,
8 when you take the mathematics of the claim, \$19 billion, or you
9 take the mathematics of Ms. Wheelahan's claim of \$900 million,
10 either one results in, I mean, one results in an absurd number,
11 one results in, if you do the mathematics and apply it to the
12 class, like 4 and a half dollars a class member, assuming no cost
13 and no litigation fees.

14 So, I mean, between those numbers somewhere there has
15 got to be a rational resolution. Now, obviously, we offered a
16 minimum value of \$40 million. And the Court says 10 million, but
17 it really comes to 40 million, I mean, in our view.

18 THE COURT: Well, I value that in kind --

19 MR. LONGTIN: As zero.

20 THE COURT: -- very little.

21 MR. LONGTIN: I appreciate that.

22 THE COURT: It's probably worth more than zero. But
23 it's not worth 22 million or whatever you put on it. And the 20
24 million, if half of it goes to fees and costs, there is 10
25 million on the table. Even if there is 20 million on the table,

1 with 190 million potential people --

2 MR. LONGTIN: I understand.

3 THE COURT: I think we need, what I would need -- well,
4 maybe we shouldn't even be talking about this on the record. I
5 mean, I do have some ideas. And maybe we should hold a meeting
6 with Judge Mason again.

7 MR. LONGTIN: That's what we would, if I'm asking for
8 anything before I -- I mean, to sit down with my client, I have
9 to give them some ideas. I mean, obviously you can see the
10 ranges here are so broad in terms of how you value the case. I
11 mean, \$19 billion is a gigantic number. Trans Union's net worth,
12 the Court has that available to it. I mean, \$19 billion is
13 significantly in advance of that net worth.

14 THE COURT: Well, I mean, nobody is, as I say, I don't
15 think anybody is trying to put Trans Union out of business. I
16 know what their net worth is. And I know what their yearly net
17 income is, too. And I think that there is a lot more money that
18 they could afford to put on the table at least potentially and
19 give people an opportunity to actually respond to a notice.

20 We all know that the response rates for even direct
21 notice classes is small. So I don't know if there has been any
22 scientific or expert opinion about how much -- if we were to
23 include a notice, let's say, in credit card bills, you know, you
24 open your credit card bill every month, and you get all kinds of
25 stuff in there, and some people like me throw it away without

1 looking at it, but that's at least notice.

2 Mr. Edelman will tell you a lot of people don't look at
3 anything in their contracts before they sign it, right?

4 And but at least that's notice. A certain amount of
5 those people would respond. To me, that's a way to do it.
6 That's a way to do it.

7 MS. WHEELAHAN: We have an expert, Your Honor. We have
8 talked to Todd Hillsby.

9 MR. LONGTIN: Your Honor --

10 THE COURT: Well, all right. I'll get to you in a
11 minute.

12 But I'm just saying that there may be other ideas out
13 there that would be more acceptable to Judge Mason, ultimately to
14 me, and maybe everybody, and it's going to cost a lot more than
15 you've got on the table now. That's the reality. Before I
16 approve a settlement, it's going to cost a lot more than you've
17 got on the table.

18 And that's subject to a fairness hearing in which I
19 would take an objective look at any objections I got. So it's
20 just got to be more than you're talking about now.

21 If you wanted to give it one more try, you know, I'm
22 always happy to do that. But the length of time that you took to
23 get to this is discouraging, and the effort that you took is
24 discouraging. But I don't know all of the, you know, the back
25 and forth and the history that you are all familiar with.

1 You know, I don't believe that Judge Mason is in the
2 business of wasting his time or yours. So there must have been
3 an awful lot of talk. That's all I can say. But it just didn't,
4 it didn't produce anything that I could approve.

5 MR. LONGTIN: Well, what are the chances of meeting with
6 you?

7 THE COURT: Well, the chances of meeting with me are
8 darn good.

9 MR. LONGTIN: I would suggest that that would be our --

10 MR. BORDERUD: That would be helpful, Your Honor.

11 MS. WHEELAHAN: I can say, Your Honor, I said "no" all
12 along. And you know I was here in your court saying "no" to
13 their settlement. Mr. Longtin says he never --

14 THE COURT: If there is one thing I know is that you've
15 been saying "no."

16 MS. WHEELAHAN: I've been saying "no," and nobody was
17 hearing me.

18 THE COURT: Well, okay. Let's talk about
19 Ms. Wheelahan's motion then, because, I mean, I don't think the
20 plaintiffs' lawyers are afraid to litigate this case. To replace
21 them at this point I think would be foolish, and I don't think
22 23(g) requires that.

23 On the other hand, Ms. Wheelahan and her companies have
24 been I think an important part of this whole process all along.
25 And I'm toy ing with, I haven't made a decision yet, I'm toy ing

1 with the idea, or considering the idea maybe is a better way to
2 put it, of allowing them to come in as co-lead plaintiffs'
3 counsel with the rest of you.

4 I know that could complicate things and perhaps create
5 some problems, but I think that Ms. Wheelahan and her colleagues
6 have played an important part in this case.

7 MS. WHEELAHAN: Thank you, Your Honor.

8 THE COURT: You know, I don't know whether that's
9 workable or not. But that's something we could certainly talk
10 about if we're going to have a meeting and try and see if we can
11 hash something out.

12 I mean, I think this case should be settled, because a
13 litigated solution could very well end up destroying this
14 company. Would it be the end of the world? Companies are coming
15 and going everyday, so it wouldn't be the end of the world to me.
16 And as I say it's not a public company, so we don't have public
17 shareholders. But that's not a good result. Nobody is seeking
18 that as a realistic resolution. And I don't even think
19 Ms. Wheelahan's suggestions are either.

20 You know, I'm open to suggestions whether maybe you can
21 take some, you know, maybe you can take some of her suggestions
22 and respond to them informally and get me some alternative
23 solutions here.

24 I think notice is a really important part of my problem
25 with all this, too.

1 MR. LONGTIN: It's a very difficult issue to deal with.

2 THE COURT: I'm sure it is. I'm sure it is. What do
3 you think about my, I think you might have suggested that you
4 could put some sort of notice in credit card bills.

5 MR. LONGTIN: Judge, you, of course, realize that people
6 who send out credit card bills are not us. I mean, that would
7 be --

8 THE COURT: No. But, you know, I see the little fliers
9 that come in the credit card bills, and it's everything from name
10 stamps to --

11 MR. LONGTIN: Right.

12 THE COURT: -- credit insurance to, you know, windshield
13 wipers I guess.

14 MR. LONGTIN: Obviously things that banks are promoting.
15 You know, we're not associated with them. They don't have
16 contracts with us to promote stuff in their mailings.

17 THE COURT: Well, you also don't have a contract with
18 Parade magazine, but you're willing to put it in Parade magazine.

19 MR. LONGTIN: You buy time.

20 THE COURT: Pardon me?

21 MR. LONGTIN: You buy time.

22 THE COURT: Yes. You buy time, and you buy access to
23 those little envelopes.

24 MS. WHEELAHAN: I could bring in Mr. Hillsby, Your
25 Honor.

1 THE COURT: Pardon me?

2 MS. WHEELAHAN: I could bring in Mr. Hillsby to talk
3 about notifications.

4 THE COURT: Well, that's just an idea that came to my
5 mind, because we get these things in the mail all the time. To
6 actually put a 41 cent, soon to be 42 cent stamp on an envelope
7 and send it to 190 million people --

8 MS. WHEELAHAN: We don't advocate that, Your Honor. But
9 Mr. Hillsby has got some -- he did all the notices for the
10 Federal Judicial Center. If you click on that, you'll find his
11 things. And he's done some really creative notices for Alaskan
12 Indians who didn't have televisions. He'll bring you something.
13 I'm not the person to talk about it. He is.

14 THE COURT: Well, you know, there is a lot you can do
15 over the Internet obviously besides just putting something on a
16 website that nobody may visit. I mean, most people don't have
17 reason to visit Trans Union websites. You could advertise on
18 television, click on this website. I don't know what that
19 coverage would be.

20 I know you have a class of beneficiaries that you
21 propose. They're non-Internet people. I assume a lot of people
22 are in that class. I'm not sure whether you've ever quantified
23 that or not or even how to identify those people. We all take
24 the Internet for granted. We're all wearing suits and ties and
25 nice clothes. We all have computers. We have too many computers

1 actually. But a lot of people out there don't have them. We
2 have to find a way to get to them. That's why I was suggesting a
3 way that just about anybody who has an open line of credit -- I
4 mean, some of the people in this class are no longer with us.
5 Some of those people probably don't have open lines anymore.
6 Some the people who have open lines now didn't have them then.

7 MR. LONGTIN: Sure.

8 THE COURT: And I'm sure there is all kinds of either
9 over or undercoverage that would be included in that. I have no
10 idea what that would cost. It's got to cost a lot less than a
11 first class letter. I just don't, I don't know. That's what I
12 mean, those are the kinds of things I would like to explore. And
13 I would be happy to explore it with you and to see if we could
14 hash something out.

15 But you've got to remember something, too, and this is
16 one reason we used Judge Mason to begin with, I have to approve
17 preliminarily and finally a settlement. If I'm involved in
18 negotiating it with you as a mediator, it's harder for me to be
19 as objective or to appear as objective as I would if I were
20 approving something that was hammered out with someone else, a
21 magistrate judge in this case or even a private mediator or the
22 parties themselves.

23 So, you know, I'm happy to talk to you about ideas, but
24 they're only going to be ideas. I'm one of these judge who when
25 I hold settlement conferences I like to come up with solutions.

1 But in a class action setting, it's harder to do that and
2 maintain my role as the ultimate decision maker.

3 Yes.

4 MR. BORDERUD: Even that would be helpful, Your Honor,
5 just getting some of your ideas, for example --

6 THE COURT: Well, I would like to do it in conjunction
7 with Judge Mason, because --

8 MR. LONGTIN: That's fine.

9 MR. BORDERUD: That would be just fine.

10 THE COURT: -- and I'm not even sure if he's around, but
11 I could go try to locate him and see when he's available. I'd
12 like to do this sooner rather than later while --

13 MR. BORDERUD: Absolutely.

14 THE COURT: -- this is about as fresh in my mind as
15 possible.

16 MR. FEIN: Your Honor, can I follow up on your comment
17 on the 23(g) motion? Ms. Wheelahan and Texas counsel, we've
18 always been frozen out. You said that you were inclined to add
19 us as co-lead counsel.

20 THE COURT: I mean, that was a thought that came to
21 mind. In a way, you are assuming a role in this case already,
22 you know, whether you have that title or not. I don't want you
23 to be frozen out anymore. You say you're frozen out. They say
24 you weren't frozen out.

25 MR. BORDERUD: Can I address that, Your Honor?

1 THE COURT: You chose to remain out. So I don't really
2 care who is --

3 MR. BORDERUD: May I address that point, Your Honor?

4 THE COURT: Sure.

5 MR. BORDERUD: They haven't been frozen out. They have
6 simply made a choice to make everything we do look bad, because
7 they want to come in and take the case.

8 MS. WHEELAHAN: They didn't tell us what the settlement
9 was, Judge.

10 MR. BORDERUD: Not true, not true.

11 THE COURT: All right. All right.

12 MR. BORDERUD: Let me just make one point. When we
13 initially set up the leadership structure, there were lots of
14 different proposals. We arrived at a proposals that we thought
15 would be efficient. It was a three-party structure so no one
16 firm would control the case. It was a democratic arrangement
17 where the three leads had to agree before major decisions were
18 made.

19 We also tried to keep the costs of this down by not
20 including so many people that, I mean, the Lodestar in this case
21 already is phenomenal, and if you add five more firms to it, it's
22 going to be in the stratosphere. That's money.

23 The flip side of this is in arriving at a cash damage
24 figure, we didn't want to drive up the price just to have that
25 money come back to us in fees or go to a nonprofit. We were very

1 mindful of the fact that it's difficult to get this cash that
2 you're talking about or relief to the class members.

3 So even if you push that number up to, you know, 80
4 million or 100 million, it's still going to have been made on a
5 claims-made basis of some kind. And whoever doesn't claim, then
6 you're looking at attorneys coming in and claiming: Well, we
7 created X value, therefore, we deserve this amount of fee.

8 We didn't want to be in that position. We were trying
9 to set something up where it covered the claimants, but it didn't
10 necessarily put us in a position where we were claiming this
11 great value. So I think we acted honorably there. I think we've
12 tried to keep the costs down.

13 THE COURT: Well, I know that Judge Aspen went through
14 that with you originally.

15 MR. BORDERUD: Right.

16 THE COURT: I want to honor that decision. But I'm also
17 not unmindful of the fact that Ms. Wheelahan and her colleagues,
18 and maybe mostly her, have been responsible for an important
19 decision that I had to make in this case. And I know it's hard
20 to foist, we're going through this in PSLRA cases now, to foist
21 lead counsel on parties, and it's hard to foist co-counsel on
22 other lawyers.

23 Maybe I just want you to think about how that might
24 work. I'm not sure we need the entire team, but I think maybe
25 adding Ms. Wheelahan and perhaps one other group may be the best

1 thing to do here. And I don't know how you could all deal with
2 that. I haven't made a decision yet on that. It's an odd
3 motion. It's a very unique motion. It's coming very, very late
4 in the case. It's almost getting on to eight years old now. And
5 I don't want it to go much longer. It's far, far too long.

6 I'm not happy with the way it's been managed, and I take
7 some blame for that. We let this go a long time, and we haven't
8 really moved the ball very far.

9 And these people, a lot of people who were entitled to
10 some even modest measure of relief here or the notice that would
11 allow them to seek individual relief are deceased or no longer
12 available or no longer reachable. And that doesn't make me
13 particularly happy.

14 I know that some of this is going to happen in any case
15 of this size. I'm not sure there has ever been a case of this
16 size before.

17 Let me adjourn for a few minutes and see if I can get a
18 hold of Judge Mason and see if he's around and when he could get
19 together with all of you having just given you these thoughts.

20 Maybe the next thing we should do is try to have a
21 meeting where we could throw some ideas around, and you could
22 take them back and then return with either, "Yeah, this is
23 doable" or "No, it's not," in which case we'll set it on to the
24 other track.

25 MR. BORDERUD: All right.

1 THE COURT: But it's got to go on. We're at that point.

2 MR. BORDERUD: I think that's a good idea, Your Honor.

3 THE COURT: All right. Let me just adjourn for a few
4 minutes.

5 (Recess. Proceedings concluded.)

C E R T I F I C A T E

7 I, Jennifer S. Costales, do hereby certify that the
8 foregoing is a complete, true, and accurate transcript of the
9 proceedings had in the above-entitled case before the Honorable
10 ROBERT W. GETTLEMAN, one of the judges of said Court, at Chicago,
11 Illinois, on March 4, 2008.

Official Court Reporter

United States District Court

Northern District of Illinois

Eastern Division

Eastern Division